Supreme Court, U.S.
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No.___

IN THE

# Supreme Court of the United States

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SYLVIA SIERRA,

*Petitioner*,

v.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

*Respondent*.

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**On Petition for Writ of Certiorari to the District Court of Appeals, Second District, Lakeland, Florida**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Due Process of Law was violated in an Eminent Domain Case when the Trial Court refused to grant the Landowner's request for a continuance in order to employ a replacement attorney to represent her in the trial?

## PARTIES TO THE PROCEEDING

Petitioner Sylvia Sierra was the defendant/Petitioner below.

Respondent State of Florida Department of Transportation was the plaintiff/Respondent below.

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## INTRODUCTION

The District Courts of Appeal in Florida constitute "the courts of last resort for the vast majority of litigants under amended Article V," Section 3 of the Florida Constitution. Florida *Rules of Civil Procedure*, Rule 9.030, *Jurisdiction of Courts*, committee notes regarding the 1980 amendment to Article V of the Florida Constitution. The amendment to Article V, Section 3 gives the Supreme Court of Florida discretionary jurisdiction as follows:

> "(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal

constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with s decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida."

When the Second District Court of Appeals of the State of Florida issued its first order merely denying Petitioner's requests for a new trial without a written opinion, Petitioner, through counsel, filed a motion for a rehearing containing a verification by Petitioner's counsel that issues one (1) and two (2) set out in the motion were issues of first impression in an eminent domain case in the State of Florida, and further, that the Florida Constitution, Article X, Section 6(a) requirement of "full compensation" in an eminent domain case, as opposed to "just compensation" would require the due process bar to be raised even higher than does the U.S. Constitution. The verification of counsel expressed a belief based upon a reasoned and studied professional judgment that a written opinion could provide a legitimate basis for Florida Supreme Court review. The Second District Court of

Appeals denied Petitioner's motion for a rehearing again without written opinion and without certification by the District Court to the Supreme Court of Florida that the case was of great public importance.

Since the case appeared to be a case of first impression on the issues raised regarding due process of law in an eminent domain case and the effect thereon by the "full compensation" requirement of the Florida Constitution, and since there was no written opinion expressly and directly declaring anything, there was no Florida Constitutional basis for Petitioner to appeal to the Supreme Court of Florida. However, as can be seen from Article V, Section 3 (6) of the Constitution the State of Florida set out above, the Supreme Court of Florida may review a question of law certified to it by the Supreme Court of the United States.

In this eminent domain case, Petitioner's three (3) previous attorneys withdrew from the case prior to trial. Petitioner tried to get another attorney prior to trial, but was unable to do so. Four (4) days before the trial date, and again on the trial date, Petitioner moved for a continuance to be allowed to try to employ replacement counsel. Petitioner, a sixty (60) year old widow with a hearing defect, who had no legal training, and who stated that she did not want to represent herself and was not capable of defending herself in this case, pleaded with the Trial Court to grant a continuance so that she could employ replacement counsel to represent her.

Petitioner was not qualified to represent herself, was not prepared for trial, did not have an expert value witness, and was not able to effectively value her property herself. She was not able to effectively cross-examine Respondent's expert value witnesses or to present her case in a credible manner. Petitioner had initially valued her property at $4,980,658.78. Through the process of taking Petitioner's deposition three (3) times and forcing her to state a basis for her opinion of value, which occurred during the time that

Petitioner was without counsel, Petitioner gave values to components to her property totaling $938.843.00, but qualified this by saying that figure was not her full opinion of value.

Petitioner's basic premise is that this eminent domain case was so complex that, by being put to trial by the Trial Court without an attorney to represent her when she did not want to represent herself, wanted an attorney, and literally begged for a continuance in order to employ an attorney who understood both eminent domain law and "historical law,"[1] she received neither due process of law nor a fair trial.

Respondent's basic premise is that the trial judge's refusal to afford Ms. Sierra another continuance when she could not come up with any convincing assurance that she would be able to obtain an attorney, was a sound exercise of discretion which should not be disturbed on appeal.

The law appears to favor Petitioner's position. Although *Powell v. Alabama* 287 U.S. 45, 772 L.Ed. 158, 53 S.Ct 55 (1932) was a capital offense criminal case, Justice Sutherland, writing for the Court, said that the aid of counsel was a fundamental right in the concept of due process of law. It is Petitioner's position that the right to the aid of counsel being of a fundamental character is especially true in an eminent domain case where, "the whole power of the state is arrayed" against a defendant, as was the case against Ms. Sierra. *Powell*, 287 U.S. 45 at 67.

The Third and Fourth District Courts of Appeal in Florida have also spoken on this issue. "The opportunity to be represented by counsel in both civil and criminal proceedings has been equated with due process." *Times Publ'g Co. v.*

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[1] Petitioner's property was located in the National Historic Landmark District of Ybor City in Tampa, Florida.

*Burke*, 375 So. 2d 297, 299 (Fla. 2d DCA 1979), citing *Powell v. Alabama, Id.*

Although the discretion to grant a continuance rests with the Trial Court, "that discretion cannot be used to deny a party the basic tenets of due process." *Cervieri v. Cervieri*, 814 So. 2d 528, 529 (Fla. 4th DCA 2002).

In considering the above cases, the Florida Third District Court of Appeals held that discretion was wrongfully used to deny counsel to a party in a civil case. *Sheinheit v. Cuenca*, 840 So. 2d 1122,1123 (Fla. 3d DCA 2003).

Since the Appellate Court wrote no opinion of why it denied Petitioner's appeal, and since there did not appear to be a conflict among the district courts of appeal, Petitioner had no basis under the Constitution of the State of Florida to ask the Supreme Court of Florida to resolve a conflict among the district courts. The concurrence of the three separate District Courts of Appeal in Florida on the issue was brought to the attention of the Appellate Court below.

Petitioner pointed out in her Reply Brief, filed in the Appellate Court, in reply to Respondent's Answer Brief, that the Trial Court could have conducted a hearing as to why the Petitioner was having trouble locating replacement counsel. The Trial Court could have required the lawyers named to come into court and state why they were unavailable or unable to be employed. It was possible that the court could have persuaded one of the lawyers to take the case and then, upon request, granted a continuance at that time. The Trial Court could have appointed a lawyer or "leaned on" one of the lawyers to represent Ms. Sierra, since it appears under the Florida Constitution requiring full compensation that the State is required to pay the fee for the landowner's attorney for benefits achieved for the client. Fla. Stat. §73.092(1)(a).

Prior to the hearing in the Florida Appellate Court, counsel for Appellate located the case of *Mathews v. Eldridge*, 424

U.S. 319 (1976) and the case of *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18 (1981). This supplemental authority was filed and was before the Court when it issued its Order denying Petitioner's appeal.[2] According to *Eldridge*, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."

The *Eldridge* case goes on to hold that,

> "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' **** More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substantive procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. See, e.g., *Goldberg v. Kelly supra,* at 263, 271."

In the Sierra case, the Trial Court did not consider the "three distinct factors" set forth in the *Eldridge* case, *supra*, before requiring her to proceed to trial without an attorney. In the Sierra case, the private interest (full compensation) was high; the risk of an erroneous deprivation of such an interest through the procedures used (eminent trial domain without an attorney) was high; the probable value of a trial with an attorney was high; and the government's interest and the fiscal and administrative burden of the substitute procedure

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[2] Florida Rules of Appellate Procedure, Rule 9.225 allows for the filing of supplemental authority "before a decision has been rendered . . ."

(allowing a continuance so that Ms. Sierra could get an attorney) was low.

So we can see that the Court, in order to satisfy the requirement of due process of law, cannot just make a discretionary decision not to continue a case in order to allow more time for a party to locate and hire an attorney. The Court must weigh the three distinct factors: the private interest, the risk of the erroneous deprivation of such interest through the procedures used, and the government's interest. There is no evidence in the record that the Court took these three distinct factors into consideration and, as a result, the fundamental requirement of due process, that is, the opportunity to be heard at a meaningful time and in a meaningful manner, was lost. *Eldridge, Id.*

## OPINION BELOW

The Second District Court of Appeals' order is enclosed in the Appendix A at 1a. There was no published or unpublished Court opinion.

## JURISDICTION

The Second District Court of Appeals of Florida entered judgment on April 28, 2004. Petitioners filed a timely petition for rehearing, which was denied on May 27, 2004. The Court has jurisdiction pursuant to 28 U.S.C. §1257 because Petitioner is challenging the validity of the final judgment decree rendered by the highest court of the State of Florida in which a decision could be had involving denial of due process law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent to this case:

1. The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the United States Constitution, Section 1, provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article I, Section 9 of the Florida Constitution, Declaration of Rights provides that: "Section 9. Due Process.—No person shall be deprived of life, liberty, or property without due process of law. . ."

4. Article X, Section 6, Eminent Domain, of the Florida Constitution provides that: "(a) No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner."

## STATEMENT OF THE CASE AND FACTS

### A. Statement Of The Case

This eminent domain action was filed by the State of Florida, Department of Transportation, herein "Respondent," on April 17, 2001. Petitioner's parcel of land being taken was identified as parcel 126.

The case came on to be tried beginning on October 28, 2002, before the Honorable Herbert Bauman, Jr. and a jury of twelve (12). On November 1, 2002, the jury reported their verdict for the value of the land taken, including two (2) buildings and one (1) garage as one hundred ninety thousand dollars ($190,000.00). The verdict was entered of record on November 4, 2002. Petitioner filed her notice of appeal on December 3, 2002. The appeal was denied without published or unpublished opinion on April 28, 2002. Petitioner timely filed her Motion for Rehearing which was denied without published or unpublished opinion on May 27, 2004. See Appendix A, page 1a.

### B. Statement Of The Facts

The Petitioner, Sylvia Sierra's, property (herein "the property" or "La Gallega's building") consisting of a sixteen (16) room boarding house and another smaller boarding house on the same lot, located in the National Historic Landmark District of Ybor City in Tampa, Florida, was taken in 2001 for public use in the widening of Highway I-4.

The property had originally been built in 1903 and owned by Vincent Martinez and later by Perfecto Garcia, a cigar magnate. The property had been in Petitioner's family since 1917 and had been owned and operated as a boarding house since that time. Petitioner's grandmother, Mrs. Hernandez, was renowned as a matriarch of Ybor City and became fondly known as "La Gallega," meaning person from Galacia, Spain.

The sixteen (16) room boarding house also became known as "La Gallega's building."

The boarders that Mrs. Hernandez took in were primarily from Spain and Cuba, and a smaller portion came from Italy. Mrs. Hernandez would find jobs for these men in the cigar industry or restaurants, both for which Ybor City became famous, and these men would stay at the boarding house until they had enough money to purchase or build a home; then they would bring their families over from Spain or Cuba, or wherever they were from. Much of the early population of Ybor City lived in the Petitioner's boarding house for a while, until they could acquire property of their own. "La Gallega's building" was the subject of an article in the Spanish newspaper, "La Gaceta," on March 10, 1995, where the editor characterized it as "possible the last of the sizeable boarding houses in this National Historic Landmark District, Ybor City." The sixteen (16) bedroom boarding house was rated number 13 in historical significance of the homes being taken for the stated public purpose in the National Historic Landmark District of Ybor City, and the smaller house was rated number 25 in historical significance.

Petitioner, Sylvia Sierra, a sixty (60) year old widow who has no legal training and who has a hearing defect (Trial Volume IV, p. 383, 399), was required by the Trial Court to represent herself at trial after the last of three previous attorneys who had represented her prior to trial withdrew. Petitioner stated in a pleading in response to one of Respondent's Motions in Limine Regarding Self-Representation that she had been forced to act as her own attorney because of unfair dealings and unethical conduct of the Florida Department of Transportation, which forced Petitioner to represent herself; that Petitioner, Ms. Sierra, was not a lawyer and did not want to represent herself, and that she was "not capable of defending herself in this case and to make her do so is a travesty of justice" (Trial Volume I, pp. 27-8).

Petitioner's position was that an offer of judgment made it "nearly impossible to acquire an attorney" because the fee structure, after the offer of judgment, would not allow an attorney to make any money on the case. (See Fla. Stat. ch. 73.092(1)(a) (2001).) Petitioner alleged that there could be "no full or just compensation with such a mismatch of power." Petitioner asked for a continuance to resolve an underlying apportionment issue, to obtain expert witnesses, to acquire counsel, and to prepare to obtain full and just compensation for the taking (Trial Volume I, pp. 27-32).

The Court refused to grant Petitioner's Motion for a Continuance and announced the case would proceed to trial (Trial Volume I, pp. 32-3).

There is attached in Appendix B an abstract from Respondent Answer Brief, filed in the Appellate Court, containing an abstract of the Court proceedings on October 24, 2002 and October 28, 2004 in respect to Petitioner's request for a continuance in order to locate and hire a replacement attorney.

At the same time, the Court granted Respondent's Motion in Limine Regarding Improper Components of Owner's Opinion of Value and other motions, which clearly demonstrated Petitioner's lack of understanding of eminent domain law and historic preservation law (Trial Volume I, pp. 7-17).

The Respondent's (Florida Department of Transportation) Motion in Limine Regarding Self-Representation stated that it could not get a fair trial with Ms. Sierra representing herself (Trial Volume I, pp. 20-2). Later, during the trial of the case, the Respondent moved for a mistrial based on the way Petitioner had conducted her case (Trial Volume V, pp. 473-4).

Petitioner raised the Constitutional Due Process of Law question in her initial brief. A copy of the cover page and the

Table of contents of her initial brief are attached hereto as Appendix C.

Petitioner submitted additional authority to the court before the first order of the Court denying her a new trial was filed on April 28, 2002. This Notice of Supplemental Authority is attached hereto as Appendix D.

## REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* for three reasons: the decision below conflicts with decisions of this and other Courts; these conflicts result in part from uncertainties in this Court's jurisprudence; and this is a case of exceptional importance.

### I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

The decision of the Trial Court, which was allowed to stand by the Florida Appellate Court, conflicts with this Court's precedents in at least three (3) respects: it allows the use of Court's discretion in granting continuances to deny a party one of the basic tenants of due process of law, the aid of counsel; it fails to protect the right of a landowner, whose land is taken by state action, to receive just compensation for her property; it fails to protect the right of a Florida landowner whose land is taken by state action to receive just compensation under the Constitution of the United States, and full compensation under the Constitution of the State of Florida.

### A. The Decision Below Conflicts with the Case of *Mathews v. Eldridge*[3], Which Propounds Three Elements to be Evaluated in Deciding What Process is Due.

The Trial Court came into conflict with this Court's decisions in failing to evaluate due process requirement protected by the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment. The Respondent, Florida Department of Transportation, does not dispute that the opportunity to be represented by counsel in both civil and criminal proceedings has been equated with due process. *Sheinheit v. Cuenca*, 840 So. 2d 1122, 1123 (Fla. 3rd DCA 2003). Respondent also has agreed that the discretion afforded a Trial Court's disposition of a motion for a continuance cannot be used to deny a party the basic tenets of due process of law. Respondent insisted, however, that civil litigants have fewer protections than those available to criminal defendants, *McDermott v. Miami-Dade County*, 753 So. 2d 729, 731 (Fla. 1st DCA 2000), and that there is no absolute right to counsel in a civil proceeding. *Onett v. Ahola*, 780 So. 2d 896 (Fla. 2d DCA 1973).The Respondent argued from this line of cases that an attorney's withdrawal in a civil case does not give his client an absolute right to a continuance, *Alter v. Alter*, 473 So. 2d 775, 776 (Fla. 3d DCA 1985), and that a continuance under such circumstances is still a matter within the Trial Court's discretion. The Respondent concluded that the trial judge's refusal to grant "yet another continuance to allow Ms. Sierra additional time to seek replacement counsel was a sound exercise of discretion which should be upheld."

The Respondent's reasoning is flawed in many respects. First of all, the facts in the cases relied on by Respondent differ greatly from the facts of the Sierra case. Secondly,

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[3] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

none of the cases cited involve an eminent domain case, which involves the presentation of so much expert testimony.

The Sierra trial lasted four (4) days. Twelve (12) witnesses testified, eleven (11) of which had various expert qualifications. It was particularly difficult for Ms. Sierra to conduct her own testimony. The amount of evidence was voluminous, involving over fifty (50) exhibits, many of which had been prepared by experts and Florida Department of Transportation specialists. The issues of the cases were extremely complex, evidenced by the number of expert witnesses used by the Department and the number of professionally prepared exhibits used in the trial. The case was of great importance, ranking along with life and liberty in the Constitutions of the United States and the State of Florida. An eminent domain case in Florida requires a twelve person jury, as opposed to a six (6) person jury, evidencing its importance.

The amount of money involved was significant. The Respondent had made an offer of judgment of $503,000.00 of which the Trial Court was aware as early as September 4, 2002. Ms. Sierra was of the opinion initially that the fair market value of her property on the date of value was $4,980,658.78. During the period of time that Ms. Sierra did not have an attorney, between September 4, 2002 and the date of trial on October 28, 2002, Ms. Sierra made one of many critical mistakes. During multiple discovery depositions of her, the Respondent, by persisting in its demand that she state a basis for her opinion of value, which a landowner does not have to give (apparently this rule of law was not known by Ms. Sierra), required her to break the value down to $938,852.00. Ms. Sierra qualified that statement that it was not her opinion of value.

Ms. Sierra was seriously prejudiced by being without counsel during this discovery process. The Respondent's expert testified to a value for the taking of $160,000.00, well

below its $503,000.00 offer of judgment. The jury returned a verdict of $190,000.00, also significantly below the Respondent's offer of judgment, and even more significantly below Ms. Sierra's opinion of the value of her property. Ms. Sierra was seriously prejudiced by being without counsel during this discovery process.

The Trial Court in refusing to grant a continuance, in order for Petitioner to hire a replacement attorney, made no statement about a press of time. If a continuance had been granted on October 24, 2002, the Court could have probably scheduled other matters for trial on the dates set aside for the Sierra trial or used that time for other Court business. The fact of the number of attorneys and assistants used by the Respondent and the lack of an attorney for Ms. Sierra was a factor to be considered by the Trial Court in whether or not to grant a continuance or assist her in getting an attorney. Ms. Sierra did not even have the assistance of her agent, Arthur Martin, who had done much of the "historical" research for her, because of his being sequestered. Ms. Sierra was not aware of the rule of sequestering witnesses and had at least counted on Mr. Martin to assist her with the trial when she could not retain an attorney. Because of her emotional involvement, Ms. Sierra was not able to relate the factual argument to the governing principles of law. On the date of trial, before the trial began, the Trial Court ruled, ". . . that most of the elements of preservation that you've identified, and I've ruled that way already, are speculative."

Also, eminent domain cases are different from most civil or criminal cases. After the taking, it is a case involving fair market value at the date of value and frequently, as did the Sierra case, involve expert testimony of value. The Sierra case was even more difficult because her property was located in a Historical Preservation Landmark District and required a special kind of value expert. Yet, her last attorney was allowed to withdraw as that process was beginning, only

six (6) weeks before the trial date, with no replacement attorney on Ms. Sierra's case.

On August 19, 2002, Petitioner's last attorney had requested and was granted a two (2) months continuance in order to obtain an expert witness who understood historic value and have that witness come from Boston to Tampa to examine the property and be prepared for testimony at the trial. The Trial Court's action in allowing the last attorney to withdraw two (2) weeks later, during this critical time for trial preparation, was detrimental to both Ms. Sierra and the Trial Court.

Ms. Sierra was a sixty (60) year old widow who was hard of hearing and admittedly was not trained in the law. She did not want to represent herself and literally begged the Court to continue the case again so that she could find an attorney who would take her case. No reasonable person knowing the complexity of the Sierra case would have expected that Ms. Sierra could match wits with two (2) Department attorneys specialized in the field of eminent domain law. In fact, one (1) of the jurors on *voir dire* gratuitously stated that he did not believe that Ms. Sierra should try the case without an attorney.

Considering the nature and complexity of this case, the Constitutional requirements in an eminent domain case, and the fact that Ms. Sierra did not want to try the case without an attorney, coupled with her statement that she could not find a lawyer who would take her case, the Court abused its discretion in not granting a continuance of the case on either October 24, 2002, at a preliminary hearing, or on October 28, 2002, the date of trial when Ms. Sierra again moved for a continuance. The Court admonished Ms. Sierra for appearing without an attorney, and when she tried to explain, the Court cut her off and told her to be quiet.

On either October 24 or October 28, 2002, the Court should have conducted a hearing and make a record of why Ms. Sierra was having trouble hiring an attorney and what the Department had done, if anything, to interfere with her getting an attorney. The Court could have asked Ms. Sierra to name the attorneys she had contacted and called some of those attorneys to come into court and verify or deny her efforts and learn why the attorneys would not take her case. If it was true that none of the attorneys that Ms. Sierra had contacted would take her case because of prior attorney's fee liens or concern that there was no potential in the case for them to earn a fee, the Court could have explained Fla. Stat. 73.032(6) to them.

Since the Respondent's attorney's interpretation of Fla. Stat. 73.032(6) is contrary to the clear reading of that statute, there is uncertainty in respect to the payment of attorney's fees in an eminent domain case in Florida. This uncertainty could have been cleared up in a hearing on the matter.

The Court could have perhaps persuaded one of the attorneys who had refused to take the case to reconsider, and, failing that, could have appointed one of the lawyers who had been concerned about the attorney's liens and attorney's fees or appointed another member of the Bar who the Court knew would step forward and take the case for reasons of professional responsibility to help a person in need of counsel. These are reasonable alternatives to putting an elderly woman to trial who was admittedly "hard of hearing," who was not schooled in the law and legal proceedings, and who had demonstrated to the Court in previous hearings that she did not understand the law of eminent domain. A hearing of this type would have provided the Trial Court an opportunity to evaluate the "three distinct factors" to be satisfied as propounded by the *Eldridge* case, 424 U.S. 319.

The totality of the nature and complexity of this case, the amount involved, the withdrawal of counsel without an

explanation of his reasons, the warning to the Trial Court by the attorney for the Respondent that Ms. Sierra might have trouble getting an attorney and the expert witnesses that she wanted, and Ms. Sierra's demonstrated inability to separate her emotional involvement with the property from the legal issues involved, dictated that she have counsel to represent her in the trial of this case as a matter of due process of law.

The Trial Court did not consider the "three distinct factors" set forth in the *Eldridge* case, *supra*, before requiring her to proceed to trial without an attorney. In the Sierra case, the private interest (full compensation) was high; the risk of an erroneous deprivation of such an interest through the procedures used (eminent domain trial with one party being without an attorney) was high; the probable value of a trial with an attorney was high; and the government's interest and the fiscal and administrative burden of the substitute procedure (allowing a continuance so that Ms. Sierra could get an attorney) was low.

A simple hearing on the question of why Ms. Sierra was having trouble locating and hiring an attorney could possibly have gone a long way in identifying the problem. It would have required the Trial Court to evaluate and weigh the "three distinct factors" propounded in *Eldridge*, *Id.* It probably would have helped Ms. Sierra in locating an attorney who understood "eminent domain and historical property" law and probably would have avoided the resulting travesty of justice (a $190,000.00 verdict for a sixteen (16) room boarding house and one additional building and lot located in the National Historical Preservation District of Ybor City, in Tampa, Florida, valued by the Petitioner to be worth from $938,852.00 to $4,980,658.78, and for which the Respondent had offered $503,000.00 before the trial).

## II. THESE CONFLICTS RESULT IN PART FROM UNCERTAINTIES IN THIS COURT'S JURISPRUDENCE.

This Court has attempted many times to define due process of law, but we have been told that it "is not susceptible to reduction to a mathematical formula." *Gibbs v. Burke*, 337 U.S. 773, 781, 69 S. Ct. 1247, 1251, 93 L.Ed. 1686. "It is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L.Ed. 1595.

The late Mr. Justice Cardoza wrote that the guarantee of due process of law mandates respect for those personal freedoms and immunities which are "so rooted in the traditions and consciences of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, or which are "implicit in the concept of ordered liberty." *Palko v. State of Connecticut*, 302 U.S. 319, 325, S.Ct. 149, 152, 82 L.Ed. 288 (cited in *Cash v. Culver*, 120 So. 2d 590, 594 (Fla. 1960)).

In numerous cases before the Supreme Court of the United States, the Court, in determining that due process was accorded, had stressed the fact that the Defendant had the aid of counsel. (*See Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767; *Felts v. Murphy*, 201 U.S. 123, 129, 26 S.Ct. 366, 50 L.Ed. 689; *Frank v. Mangun*, 237 U.S. 309, 344, 35 S.Ct. 582, 59 L.Ed. 969; *Kelly v. State of Oregon*, 273 U.S. 589, 591, 47 S. Ct. 504, 71 L.Ed. 790; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895.

*Mathews v. Eldridge*, 424 U.S. 319 (1976) gave us the first formulae with which to analyze the various interests that are at stake in assuring that due process of law is afforded in a case.

This Court in the case of *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 640 (1981), was faced with whether a parent faced with a petition to terminate his alleged parental rights and who had been denied the appointment of counsel in the Trial Court had been denied due process of law.

In upholding the Appellate Court,[4] this Court stated that,

> "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[Unlike] some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of 'fundamental fairness' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter* at 24-25.

It must be remembered that Ms. Sierra, in the case at bar, did not request appointed counsel, she merely requested a continuance in order to locate and employ replacement counsel for her previous attorney, who had withdrawn from her case. As far as this writer is aware, this Court has never assessed the interests at stake in such a case as this.

## III. THIS IS A CASE OF EXCEPTIONAL IMPORTANCE

The Respondent, Florida Department of Transportation, has the obligation imposed by the Florida Constitution to see

---

[4] The Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review, 299 N.C. 120, 262, S.E. 2d 6.

that Ms. Sierra receives "full compensation" for her property taken by eminent domain proceedings. This Court will not see many cases involving the taking of land for public improvement where the resources of the landowner were so outweighed by the power of the State. The Court in the *Lassiter* case stated: "If as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests," the State's interest in assuring that Ms. Sierra receives full compensation would "perhaps best be served by a hearing in which" both Ms. Sierra and the State "are represented by counsel, without whom the contest of interest may become unwholesomely unequal." 452 U.S at 28.

The people of Florida have recognized as much by adopting a Constitution that requires the State to pay "full compensation" for the taking of property by the state, not merely "just compensation." Article X, Section 6(a) of the Florida Constitution; United States Constitution, Fifth and Fourteenth Amendments.

The Sierra case presents a classic fact situation where counsel for the landowner was essential to help equalize the balance of power between the landowner and the State of Florida so that the landowner would receive "fundamental fairness at trial." *In Re Gault* 387 U.S. 1 (1967).

Both the United States and the Florida Constitution guarantee that no person shall be deprived of life, liberty, or property "without due process of law" and "just" and "full" compensation. Under the facts of this, the only way possible for these requirements to be met was for Petitioner to be represented by counsel.

As matters now stand, Petitioner was denied due process of law and just and full compensation for her property taken by eminent domain by being put to trial without counsel.

Judicial discretion was used to trump constitutional rights. This Court's review is needed now.

## CONCLUSION

For the foregoing reasons, the petition for write of certiorari should be granted.

Respectfully submitted,

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August 24, 2004

# APPENDICES

**APPENDIX A**

IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF FLORIDA SECOND DISTRICT,
POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

---

CASE NO.: 2D02-5767
L.T. No.: 01-3228

---

SYLVIA SIERRA,
*Appellant/Petitioners*,

v.

STATE, DEPARTMENT OF TRANSPORTATION,
*Appellee/Respondents*.

---

May 27, 2004

---

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Doyle E. Richardson, Esq. Gregory G. Costas, Esq. Richard Ake, Clerk

bl

[SEAL]

/s/ James Birkhold
JAMES BIRKHOLD
Clerk

**APPENDIX B**

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

---

Case No. 2D02-5761

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SYLVIA SIERRA,

*Appellant*,

v.

DEPARTMENT OF TRANSPORTATION,

*Appellee*.

---

Opinion filed April 28, 2004

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Appeal from the Circuit Court for Hillsborough County; Herbert J. Baumann, Jr., Judge.

Doyle E. Richardson of Law Office of Gregory G. Keane, P.A., Stuart, for Appellant.

Pamela S. Leslie, General Counsel, and Gregory G. Costas, Assistant General Counsel, Tallahassee, for Appellee.

PER CURIAM.

Affirmed.

WHATLEY, SILBERMAN, and VILLANTI, JJ., Concur.

## APPENDIX C

(R12 1353-1354)

Approximately two weeks later, on September 4, 2002 the parties were back in front of the trial judge on Mr. Haapa's motion to withdraw. (R12 1363, 1366) Ms. Sierra agreed to Mr, Haapa's withdrawal.[2] (Rl2 1367) Concerning Mr. Haapa's withdrawal, counsel for the Department observed:

> The other reality that this court needs to know the history of this case, Ms. Sierra will be going out looking to hire the fourth attorney, and the court having practiced law a number of years, you can appreciate the difficulty she's going to have to find an attorney to represent her with the knowledge that she's already been through three attorneys.
>
> And the other issue is she's talking about hiring a new team of experts. In this case there is an offer of judgment made by the department that there's a real possibility that Ms, Sierra's judgment might not exceed, and if that happens, the experts that do eminent domain cases represent or do their work under the contingency that they'll. be paid from whatever the court awards or whatever they negotiate with the department.
>
> With an offer of judgment this high, I believe it's like five hundred and three thousand dollars, she's going to have difficulty getting new experts on board at this point.

(R12 1368-13697

The trial judge allowed Mr. Haapa to withdraw but kept the trial set for October and told Ms. Sierra that he would expect

---

[2] At a subsequent hearing, Ms. Sierra indicated that Mr. Haapa had quit six times and she accepted the last time he quit. (R13 1468-1469)

her to try the case if she did not have new counsel. (R12 1369) The trial judge further warned her in this regard stating:

> If you have a new counsel, he'll have to appear before the court and explain why I should move the trial date. Okay. But the trial date is set.
>
> I may not permit the continuance of the trial, but I am not precluding your new counsel from making a request of the court. But if you don't have .a new counsel, I'll expect you to try it, and I'll expect you to know the rules of evidence and the rules of procedure.
>
> * * *
>
> My only comment to you is if you're going to find somebody, do it quick. You know, because—
>
> MS. SIERRA: We have, Your Honor—
>
> THE COURT:—with having somebody show up the day we're supposed to start trial is—is going to be—problematic at that time to do anything but proceed with the trial because everybody will have been there so—
>
> * * *
>
> If you have an attorney, he needs to get in front of me and ask me to change deadlines if they're in place or anything else. But you have to have an attorney. I mean, I can't re-arrange things on the—assuming you're going to have an attorney. I want to see the attorney. Okay.
>
> So you need to go out and hire an attorney as soon as possible. *That's what I'm* telling you. If you're going to have one.
>
> * * *
>
> If you're going to find somebody find them quick, okay, Ms. Sierra. All right.

(R12 1370-1371, 1376, 1383)

On October 24, 2002, some seven weeks after Mr. Haapa withdrew, and four days before the scheduled commencement of trial, Ms. Sierra was before the court seeking another continuance to enable her to retain counsel. (R13 1463, 1466) The following excerpts are illustrative of the trial judge's efforts to deal with the matter:

> THE COURT: Okay. Well, I had previously indicated, you know, I've continued this case before, Ms. Sierra.
>
> MS. SIERRA: Uh-huh.
>
> THE COURT: And I've indicated on that occasion that we were going to go to trial. But if you were going to retain a new counsel I'd entertain a motion from him. But you have no new attorney.
>
> MS. SIERRA: No. But I haven't been able to get an attorney and it's all been because of deception from the DOT. I mean they stopped me from getting an attorney.
>
> THE COURT: Well, ma'am, there are a lot of attorneys.
>
> MS. SIERRA: I've called them.
>
> THE COURT: And you've already had a number of attorneys representing you. Okay?
>
> MS. SIERRA: Your Honor, they've had six attorneys. I've only had three. They've had six attorneys. I've had five judges, so you know, I'm still ahead of the game with just three attorneys.
>
> * * *
>
> THE COURT: Let me explain this. It would be my tremendously great preference to have you in here with an attorney.
>
> MS. SIERRA: Me, too. Me, too. I'm not here by choice.

THE COURT: But I don't see one here and I don't know—I have no assurances that you're going to have one at any time—

MS. SIERRA: Of course you have an assurance because—

THE COURT: What's that?

MS. SIERRA:—because the minute that I get rid of Bill Haapa's liens, if an attorney came in here and got rid of all the liens, Michael Gains, who doesn't have a lien because he quit either—he quit as well, and he left here saying, "you owe me nothing." And now all of a sudden all of these things are the ones that are getting in the way of my getting an attorney. They've told me this. I've contacted attorney after attorney and they've said there's no money in there. So, you know, you have to take care of these things first.

THE COURT: All right. Well,'come on in Monday morning. We're going to start trial at this point. If you have an attorney show up Monday morning and say to the Court, I am going to represent Ms. Sierra.

I would prefer to have an attorney representing you and I'll just let the DOT know that I will work with that. But if you don't have an attorney I have no assurance that you're ever going to have an attorney.

MS. SIERRA: You know—

THE COURT: And this case has to go to trial.

———

MS. SIERRA: Ah-huh. After the number of calls, and I've called a number of attorneys after, and a number of calls and they're all telling me the same things [sic] is that you need to clear up some of these issues before you can get another attorney. You know, and by the

deception and the abuse of the FDOT, I'm the one that's paying the price. I'm the one that's here without an attorney because they put me in that a [sic] situation.

THE COURT: Ma'am, all I want you to do is find an attorney. Okay? That's what I'm for you to do.

MS. SIERRA: And all I want you to do is give me time to get one.

THE COURT: You've had—MS SIERRA: No, I've not.

THE COURT: All right, ma'am. We'll see you Monday morning at 9:00.

(R13 1466-1467, 1469-1471)

The cause came on for trial on October 28, 2002, with Ms. Sierra announcing that she was ready to proceed "under duress." (TI 5) During argument on a pre-trial motion, Ms. Sierra again raised the issue of a continuance stating:

MS. SIERRA: So, well, then why am I not granted a continuance so that I can get a historical lawyer so that I can prove to that the law is different?

THE COURT: Because—

MS. SIERRA: That the Historic Preservation Law of 1966 is together with eminent domain. They're both; they're not separate. They're both.

THE COURT: All right. The reason is I've granted you continuances already. I've heard argument from your attorney already. I advised you if you wanted to retain a new counsel, have him appear, ask for a continuance, but you've done none of those. And so—

MS. SIERRA: Yes—

THE COURT: Don't. Quiet, ma'am. And so we're going to have the trial today. It's going to be about the

taking. It's going to be the value of the property and my ruling is that most of the elements of preservation that you've identified, and I've ruled this way already, are speculative.

(TI 19-20)

**APPENDIX D**

IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT LAKELAND FLORIDA

---

CASE N0: 01-01-3228 Parcel 126

---

SYLVIA SIERRA,
*Defendant/Appellant*
*Cross/Appellee*,

VS.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,
*Plaintiff/Appellee Cross/Appellant.*

---

APPELLATE CASE NO. 02-5761

APPEAL FROM THE CIRCUIT COURT, CIVIL DIVISION
OF THE THIRTEENTH JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY

---

THE HONORABLE HERBERT BAUMAN JUDGE OF
CIRCUIT COURT

ORAL ARGUMENT REQUESTED

---

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**APPENDIX E**

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

[Filed Apr. 20, 2004]

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CASE NO.: 2D02-5761

---

SYLVIA SIERRA,

*Appellant*,

VS.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

*Appellee*.

---

NOTICE OF SUPPLEMENTAL AUTHORITY

---

ON APPEAL FROM THE THIRTEENTH NDICIAL CIRCUIT COURT, IN AND FOR HTLLSBOROUGH COUNTY, FLORIDA CASE NO. CASE NO. 01-02 2990 PARCEL NO. 126

---

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IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

---

CASE NO.: 2D02-5761

---

SYLVIA SIERRA,

*Appellant*,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

*Appellee*.

---

NOTICE OF SUPPLEMENTAL AUTHORITY

Comes the Appellant, SYLVIA SIERRA, and gives notice of supplemental authority that is relevant to Issues 1 and 2 of her Initial *Brief* and to her Rebuttal in her Reply Brief.

The case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), is attached hereto as *Appendix* 1. The case of *Lassiter v. Department of Social Services of Durham* bounty. North Carolina, 452 U.S. 18 (1981), is attached as *Appendix 2*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 23 2004
OFFICE OF THE CLERK

(2)

No. 04-553

In The
# Supreme Court of the United States
October Term, 2004

**SYLVIA SIERRA,**
**Petitioner,**
**v.**

**STATE OF FLORIDA,**
**DEPARTMENT OF TRANSPORTATION,**
**Respondent.**

**On Petition For A Writ of Certiorari To The District Court of Appeal, Second District, State of Florida**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether due process of law was violated in an eminent domain case when the trial court refused to grant the landowner's request for a continuance in order to employ a replacement attorney to represent her in the trial.

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## STATEMENT OF THE CASE

Respondent Department of Transportation (the "Department") commenced this action in April 2001 to acquire the subject property for use in an extensive project to improve the capacity of Interstate 4 in Tampa. At that time, Petitioner Sylvia Sierra was represented in this matter by Moran, Tileston & Simon, P.A., but that relationship ended in July 2001. (R. Vol. 1, p. 148). Sierra then retained her second attorney, Michael W. Gaines, in August 2001, (*id.*, p. 178); however, Gaines moved to withdraw from the representation three months later "based on some fundamental differences with the client[]," (R. Vol. 5, p. 981). Just prior to conducting its "order of taking" hearing concerning the subject property on November 8, 2001, the court permitted Gaines to withdraw after confirming with Sierra that she did not challenge the motion. (*Id.*, pp. 984, 1000).

The court then granted Sierra a continuance until November 16, 2001 to find replacement counsel, and advised Sierra that if she wished to get counsel for the order of taking hearing, she needed to "get on with that ASAP." (*Id.*, p. 1000). When Sierra did not get counsel for the hearing, the court required the hearing to go forward with Sierra proceeding pro se. (R. Vol. 12, p. 1185). The trial judge afforded Sierra a great deal of latitude, at one point explaining that he "need[ed] to bend over backwards" to accommodate her because of her lack of legal training. (*Id.*, p. 1263). In December 2001, Sierra retained her third attorney in this matter, William Haapa, Jr., who appeared on Sierra's behalf on December 20, 2001 and withdrew Sierra's objections to the order of taking. (R. Vol. 5, p. 927).

The case was eventually scheduled for trial the week of August 26, 2002. (R. Vol. 13, p. 1418). However, at a hearing on pre-trial motions on August 12, 2002, both counsel for the Department and for Sierra indicated that they might not be ready to proceed that week. The Department informed the court that one of its witnesses might have to undergo unexpected back

surgery, but that it would be ready for trial if he did not. (*Id.*, pp. 1390-93). Haapa asked for a two-month continuance on Sierra's behalf to acquire and prepare an expert on appraising properties in historic districts, representing to the court that an expert had just been located. (*Id.*, pp. 1393, 1395-96). The trial judge stated that he was not inclined to continue the trial, but advised the parties that if they stipulated to a continuance, he would "give some heavy weight" to their request. (*Id.*, pp. 1420-21).

At a hearing the following week, the Department indicated that it was ready to proceed to trial. (R. Vol. 12, pp. 1336, 1348). Haapa again sought a two-month continuance in order to prepare his historic valuation expert. (*Id.*, pp. 1351-52). The trial judge expressed reluctance but nonetheless granted the continuance, explaining that "[a]lthough . . . I really, really don't want to continue this, . . . I am nonetheless going to continue it. And the reason I'm going to continue it is so that there can be an adequate opportunity for Ms. Sierra to present . . . whatever evidence she plans to present, admissible or inadmissible." (*Id.*, pp. 1353-54). The trial date was moved forward to October 28.

Approximately two weeks later, on September 4, 2002, the parties were back in front of the trial court on Haapa's motion to withdraw–on the ground that he had irreconcilable differences with Sierra. (*Id.*, pp. 1366, 1369). Sierra indicated that she did not object to Haapa's withdrawal and that she no longer wanted him as her attorney. (*Id.*, p. 1367). The Department, however, strenuously objected to Haapa's withdrawal if it would cause the case to be continued past October 28, 2002, and asked the court to apprise Sierra that her discharge of Haapa is "done with full knowledge that anyone [she] hire[s] has to be hired under the condition that they're going to be ready to try this case October 28th." (*Id.*, pp. 1367-68). The Department also reminded the court of the history of the case, and of Sierra's track record in retaining counsel, noting that "Ms. Sierra will be going out looking to hire the fourth attorney," and that she will have difficulty "find[ing] an attorney

to represent her with the knowledge that she's already been through three attorneys." (*Id.*, p. 1368). The trial judge discharged Haapa, but made clear to Sierra that "[i]f you don't have a new counsel by October, I'll expect you to try the case on your own behalf," and warned her that "if you're going to find somebody, do it quick" because it would be problematic to have a new lawyer show up just before trial. (*Id.*, pp. 1369-371).

On October 24, 2002, seven weeks after Haapa withdrew, and four days before trial, Sierra appeared before the court to seek another continuance. The trial judge denied this request, explaining to her that although "[i]t would be my tremendously great preference to have you in here with an attorney[,] . . . I don't see one here and . . . I have no assurances that you're going to have one at any time." (R. Vol. 13, pp. 1469-471).

On October 28, 2002, Sierra appeared in court, and, during argument on a pre-trial motion, again raised the issue of a continuance to obtain a "historical lawyer." (Tr. Vol. I, pp. 19-20). The judge again explained why he denied her motion, stating: "The reason is I've granted you continuances already. I've heard argument from your attorney already. I advised you if you wanted to retain a new counsel, have him appear, ask for a continuance, but you've done none of those. . . . And so we're going to have the trial today." (*Id.*).

During the trial, the court afforded Sierra wide latitude in light of her self-representation, as it had during the order of taking hearing in November 2001. At one point, during a bench conference generated by a Department objection to Sierra's questioning, the judge informed the parties that he was "going to give [Sierra] a lot of latitude as long as the questions are in any way related to the value of the building and its value at the date of taking." (Tr. Vol. VI, pp. 586-87). Later in the trial, the court apprised Sierra, during a long colloquy, of the proper protocol for impeaching a witness's credibility after she had called a Department witness a liar. (*Id.*, pp. 707-08).

At trial, the Department presented evidence establishing that the value for the taking was $160,000. (Tr. Vol. IV, p. 363). The jury returned a verdict of $190,000. (Tr. Vol. IX, p. 1077).

Sierra appealed to the Florida Second District Court of Appeal (the "Second District"), raising essentially the same arguments that she now raises in her petition for certiorari–that the trial court's denial of her motion for a continuance to obtain replacement counsel violated due process, and that she was prejudiced as a result of having to proceed pro se. In April 2004, the Second District affirmed the trial court's judgment without opinion and, in May 2004, denied Sierra's motion for rehearing.

## REASONS CERTIORARI SHOULD BE DENIED

### I. The trial court did not abuse its discretion in denying Sierra's request for a continuance.

Whatever extent a right to counsel exists in eminent domain proceedings, Sierra has clearly confused the "right to be represented by counsel," which may be inherent in due process, "with the *necessity* of being represented by counsel, which is not." *Rex Investigative & Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971). While a trial judge cannot act so unreasonably as to undermine a litigant's access to effective representation, nothing in the Constitution entitles a litigant to delay a trial "by simply showing up without counsel . . . whenever his case is called for trial." *Sampley v. Attorney Gen. of North Carolina*, 786 F.2d 610, 613 (4th Cir. 1986), *cert. denied sub nom., Sampley v. Thornburg*, 478 U.S. 1008, 106 S. Ct. 3305, 92 L. Ed. 2d 719 (1986); *see also, e.g., Connor v. Scroggs*, 821 So. 2d 542, 553 (La. Ct. App. 2002) ("[T]he plaintiff is not entitled to indefinite continuances simply because he is unable to secure counsel."); *Maynard v. Bullis*, 222 P.2d 685, 686 (Cal. Ct. App. 1950) (holding that when plaintiff had more than two months notice of impending trial, "[t]he fact that eight attorneys had refused to represent him is not a ground for continuance of the trial"). Otherwise, "a party could prolong

litigation interminably merely by inducing counsel to withdraw or by discharging him." *Maneikis v. State*, 407 N.E.2d 1178, 1180 (Ind. Ct. App. 1980).

Even where constitutional rights are clearly implicated, the overwhelming weight of authority from this Court and others establishes that trial courts have broad discretion in matters of continuances that should not be disturbed absent "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964) (noting that "[t]he matter of continuance is traditionally within the discretion of the trial judge"); *see also, e.g., Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472, 1479 (11th Cir. 1991) (holding that trial court's discretion to deny continuance "will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence") (quoting *Grunewald v. Missouri Pac. R.R.*, 331 F.2d 983, 986 (8th Cir.1964)). Courts have been particularly reluctant to reverse a trial court's decision to deny such a continuance when the litigant claiming error had either discharged her previous attorney just before trial or had acquiesced in her attorney's withdrawal. *See, e.g., National Am. Bank v. Bankers Int'l Ins. Co.*, 386 F.2d 216 (3d Cir. 1967) (holding that trial court had not abused its discretion in refusing to grant a continuance after appellant discharged his attorney); *see also* Carl T. Drechsler, Annotation, *Withdrawal or Discharge of Counsel in Civil Case as Ground for Continuance*, 48 A.L.R.2d 1155, 1159 (1956) ("There is not a single case involving the discharge of an attorney in which it was held that a continuance should have been granted [where] the taking by the party of an affirmative step caus[ed the] lack of representation at [] trial."). At least one state appellate court has applied this rule in affirming a trial court's denial of a property owner's request for a continuance in an eminent domain proceeding. *Maneikis*, 407 at 1180-81 (holding that trial court had not abused its

discretion by denying appellant's motion to continue jury trial on value of condemned property after appellant discharged her attorney just before trial).

This Court has also made clear that there is generally no right to counsel in civil proceedings where no significant interest in physical liberty is at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27, 101 S. Ct. 2153, 2159, 68 L. Ed. 2d 640 (1981) (recognizing presumption that a litigant has a right to counsel in civil proceedings "only when, if he loses, he may be deprived of his physical liberty"); *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 332, 105 S. Ct. 3180, 3195, 87 L. Ed. 2d 220 (1985) (explaining in case where "the only interest protected by the Due Process Clause is a property interest in the continued receipt of benefits," precedent establishing parameters of due process protection in context of deprivation of liberty interests was "of only tangential relevance"); *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 618 (3d Cir. 1988) ("The Supreme Court has not recognized a constitutional right to counsel in a civil case or in a civil matter before an administrative agency."). As this Court has never recognized a due process right to counsel in a civil trial where only a property interest is at stake,[1] a court could readily conclude that the issue of whether the trial court abused its discretion in denying Sierra's request for a further continuance to obtain new counsel exists independently of any federal right to due process protection.

In the criminal context, where the Sixth Amendment right to aid of counsel is implicated, this Court has stated that "it is not every denial of a request for more time that violates due process even if the party . . . is compelled to defend without counsel,"

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[1]Sierra, when represented by counsel, had previously withdrawn any objection to the taking itself. (R. Vol. 5, p. 927). The only remaining interest at issue was Sierra's right to monetary remuneration.

*Ungar*, 376 U.S. at 589, 84 S. Ct. at 849, and that "broad discretion must be granted trial courts on matters of continuances" because of the "great deal of latitude" that trial judges "necessarily require . . . in scheduling trials," *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616. As such, this Court has concluded that denial of a continuance will be upheld unless it is "so arbitrary as to violate due process," *Ungar*, 376 U.S. at 590, 84 S. Ct. at 850, and that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris*, 461 U.S. at 11-12, 103 S. Ct. at 1616. Intuitively, the right to aid of counsel can be no broader in the civil context, to the extent that it even exists. Accordingly, this Court's conclusion that constitutional rights are not implicated absent "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" must apply *a fortiori* in this case, irrespective of whether, as a result of the trial court's decision, Sierra was compelled to represent herself at trial.

Weighed against this framework, the trial court's decision in this case could not possibly have violated Sierra's due process rights because it was eminently fair and reasonable under any standard of review. This case was scheduled to go to trial on August 26, 2002 when, on August 19, 2002, the trial court granted Sierra's request for a two-month continuance. (R. Vol. 12, pp. 1353-54). In doing so, the trial judge made abundantly clear to Sierra at that time that he "really, really [did not] want to continue this [case]," (*id.*), which should have put Sierra on notice that he would be disinclined to grant further continuances. Sierra voiced no objection two weeks later when Haapa, Sierra's third attorney in this matter, moved to withdraw, indicating, instead, that she no longer wanted Haapa as her attorney. (*Id.*, p. 1367). The trial judge then put Sierra on notice that she would not be getting any further continuances, stating unequivocally that "[i]f you don't have a new counsel by October, I'll expect you to try the case on your own behalf." (*Id.*, pp. 1369-370). As

such, Sierra could not possibly have been unfairly surprised by the trial court's decision. *See Taylor v. Gill St. Invs.*, 743 P.2d 345, 349 (Alaska 1987) (affirming trial court's denial of continuance after court granted previous continuances and informed appellant that no further continuances would be granted, and that appellant would have to represent himself if he did not appear with attorney).

Sierra's assertions of fundamental unfairness are further undermined by the fact that on September 4, 2002, at the time Sierra acquiesced in her counsel's withdrawal, her case had just been continued until October 28, 2002. Even if Sierra was entitled to a continuance to find replacement counsel, the court could have reasonably concluded that this eight-week period was long enough. *See, e.g.*, *Everitt v United States*, 303 F.2d 536, 543 (5th Cir. 1962) (concluding that defendant's "failure to find counsel during [ten-day continuance] suggests that if he tried at all he did not try very hard"), *cert. denied*, 372 U.S. 920, 83 S. Ct. 734, 9 L. Ed. 2d 725 (1963); *Roberson v. Roberson*, 309 S.E.2d 520, 522 (N.C. Ct. App. 1983) (characterizing three weeks as "ample opportunity to retain new counsel"). The trial judge implicitly made this point to Sierra in denying her request for the continuance on October 24, 2002, explaining that, as a result of her failure to obtain counsel and representations at the hearing, he "ha[d] no assurances that [she was] going to have [a replacement attorney] at any time." (R. Vol. 13, pp. 1469-471).

Indeed, Sierra's comment prior to trial on October 28, 2002, that she was seeking a continuance "so that [she] could get a historical lawyer," (Tr. Vol. I, p. 19), could have suggested to the court that she was waiting for a lawyer that specialized in historic preservation law, and that this was a substantial factor in the delay. Sierra admits as much in her petition in stating that she sought a continuance, not just to employ an attorney, but "to employ an attorney who understood both eminent domain law and 'historical law.'" Petition for Writ of Certiorari, at 4; *see also id.*, at 18 (commenting that requested hearing "probably

would have helped Ms. Sierra in locating an attorney who understood 'eminent domain and historical property law' . . . "). Surely, due process cannot require a court to wait indefinitely while a civil litigant seeks out such specialized representation.

To reverse the Second District's order in this case, this Court would have to overlook its precedent in the criminal context as well as the overwhelming weight of authority from state courts and lower federal courts. The test enunciated by this Court in criminal cases, which should apply with at least equal force here, is whether the trial court's decision constituted "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616 (internal quotations omitted). Where, as here, the trial court's decision was far from "unreasoning and arbitrary," there can be no due process violation.

## II. There is no conflict with *Mathews v. Eldridge.*

The Second District's order affirming the trial court's entry of judgment is completely consistent with *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). As the discussion above demonstrates, this Court has not employed *Mathews* balancing in the context presented here–where a litigant claims that denial of a continuance violated her constitutional rights. In *Morris*, decided seven years after *Mathews*, this Court appeared to reaffirm the holding of *Ungar* that the only issue to be decided in this context is whether the trial court's decision was so "unreasoning and arbitrary" as to constitute abuse of discretion. *Morris*, 461 U.S. at 11-12, 103 S. Ct. at 1616; *see Ungar*, 376 U.S. at 590, 84 S. Ct. at 850 (stating test as whether trial court's decision was "so arbitrary as to violate due process").

Moreover, this Court explained in *Lassiter* that the factors enumerated in *Mathews*–the private interest at stake, the government interest, and the risk that the procedures employed may lead to erroneous decisions–must be weighed against the

presumption that there is no right to counsel "in the absence of at least a potential deprivation of physical liberty." *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161-62. While Sierra acknowledges *Lassiter*, she fails to explain how her financial interest at stake in this case (getting full monetary compensation for her property)[2] is somehow more significant than the liberty interest at stake in *Lassiter* (termination of parental rights) in such a way that the presumption against additional process is overcome in this case while it was not overcome in *Lassiter*.

Sierra further errs in applying *Mathews* by undervaluing the governmental interest at stake, which she describes as "allowing a continuance so that [she] could get an attorney." Petition for Writ of Certiorari, at 18. While Sierra characterizes this interest, without analysis or citation of authority, as "low," *id.*, this Court and other courts have repeatedly recognized the importance of the trial judge's flexibility in scheduling trials to the effective administration of justice. *See, e.g., Morris*, 461 U.S. at 11, 103 S. Ct. at 1616; *Ungar*, 376 U.S. at 591, 84 S. Ct. at 850; *see also, e.g., United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988), *cert. denied*, 487 U.S. 1211, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988) (noting that right to choose counsel "must not obstruct orderly judicial procedure and deprive courts of the exercise of their inherent power to control the administration of justice"); *United States v. Khan*, 728 F.2d 676, 681 (5th Cir. 1984) (affirming denial of continuance on ground that any prejudice appellant suffered by the denial "was outweighed by the public's 'interest in the prompt and efficient administration of justice, and the trial court['s interest] in the management and control of its own docket'").

In *Morris*, this Court explained that "[t]rial judges necessarily require a great deal of latitude" because of the burden

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[2]Petition for Writ of Certiorari, at 18. As stated above, Sierra withdrew any objection to the taking itself. (R. Vol. 5, p. 927).

"of assembling the witnesses, lawyers, and jurors at the same place at the same time," and asserted that "this burden counsels against continuances except for compelling reasons." *Morris*, 461 U.S. at 11, 103 S. Ct. at 1616. Given the government's significant interest in managing its docket, and the presumption against additional process when physical liberty is not at stake, the Second District's order affirming the trial court's judgment in this case is completely consistent with *Lassiter* and *Mathews*.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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No. 04-553

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

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SYLVIA SIERRA,

*Petitioner*,

v.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

*Respondent.*

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**On Petition for Writ of Certiorari to the District Court of Appeals, Second District, Lakeland, Florida**

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Due Process of Law was violated in an Eminent Domain Case when the Trial Court refused to grant the Landowner's request for a continuance in order to employ a replacement attorney to represent her in the trial?

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

The decision of the Second Circuit Court of Appeals of Florida (the Court of last resort under Art. V, Section 3(b) of the Florida Constitution) should not be allowed to stand. The case is a case of first impression on the question of whether due process of law was violated in an eminent domain case when the trial court refused to grant the landowner's request for a continuance made four (4) days prior to trial, as well as on the date of trial, in order to employ a replacement attorney to represent her in the trial. The Petitioner represented to the court that she had been unable to find an attorney who would

take her case and that she was not qualified to represent herself and did not want to represent herself.

Without a hearing to learn the basis of Petitioner's problem in her efforts to employ counsel, and without a statement of any inconvenience to the court in granting a motion for a continuance, the court arbitrarily insisted that the case proceed to trial without Petitioner being represented by counsel.

Petitioner was a sixty (60) year old woman who was hard of hearing, was not an attorney, was unfamiliar with the law and the court procedures, and who did not have a value expert for the value-determining phase of this eminent domain case. After a four (4) day trial, the jury returned a verdict of $190,000.00 in this case where the Respondent had previously made an offer of judgment of $503,000.00.

The Constitution of the State of Florida, Article X, Section 6(a), Eminent Domain, provides that the landowner is entitled to "full compensation" for private property taken for a public purpose.

Petitioner argues that the assistance of counsel was necessary for her to receive the "full compensation" to which she was entitled under the Constitution of the State of Florida, and the "just compensation" to which she was entitled under the Constitution of the United States.

## I. REPLY TO RESPONDENT'S OPPOSITION TO THE WRIT

The Respondent, State of Florida Department of Transportation has not articulated sound reasons that certiorari should be denied. In fact, the case primarily relied on by the Respondent, *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616, 75 L. Ed 2d 610 (1983), contains several pages of facts that the Court weighed in determining whether or not the petitioner in that case had been denied his Sixth Amendment right to counsel when appointed counsel was substituted

shortly before his trial. This balancing of the interests and risks is very similar to the one that Petitioner Sierra argues was not conducted in her case but which is required by the case of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

It is the total lack of an inquiry as to why Petitioner was having trouble employing new counsel and a total lack of any factors articulated by the court as to why another continuance would inconvenience the court that creates "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" *Morris*, 461 U.S.1 at 11-12.

The action of the trial court in putting Ms. Sierra to trial without the assistance of counsel and without considering the balancing factors required by *Mathews v. Eldridge, id.* and *Morris v. Slappy, id.* meets the test that denial of a continuance will be upheld unless it is "so arbitrary as to violate due process." *Ungar v. Sarafiti*, 376 U.S. 575 (1964). The facts of the *Ungar* case cited by Respondent in their Response, however, are vastly differently from the *Sierra* case. The charge of criminal contempt in the *Ungar* case revolved around one statement made by Mr. Ungar. "Furthermore, the motion for a continuance to hire counsel and prepare a defense was not made until the day of the scheduled hearing and Ungar himself was a lawyer familiar with the court's practice of not granting adjoinments." *Ungar, id.* at 590.

Petitioner did not undervalue the government interest at stake as stated by the Respondent. Neither the Respondent nor the Court points to any facts or scheduling problems that would inconvenience the Respondent or the Court in granting Petitioner another continuance in order to locate and employ replacement counsel. Petitioner's request was not motivated by a desire to delay a trial since she could not receive full payment for her property until the case was concluded. The problem that Petitioner faced when attempting to employ replacement counsel after her third attorney, who was allowed by the Court to withdraw, had been anticipated by

counsel for Respondent when he objected to the Court allowing Petitioner's attorney to withdraw, stating that Ms. Sierra might thereafter have trouble getting an attorney and the expert witnesses that she wanted.

There is no problem with Ms. Sierra wanting an attorney that understood valuation of property located in a National Historic Landmark District. Under the Florida Constitution, Petitioner was entitled to "full compensation" for her property, not merely "just compensation." In weighing whether or not to grant another continuance, the trial court was required to consider this factor. In order to gain "full compensation," Petitioner needed all the assistance and advantage that was reasonably available, and it is obvious from her Petition that she did not desire to, and was not capable of, representing herself, and that the assistance of counsel was necessary for her to receive due process of law. For the purposes of due process, there is no difference in the "right to be represented by counsel" and "the necessity to be represented by counsel." The case of *Rex Investigative & Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696 (E.D.N.Y. 1971) is not controlling on Respondent's attempted distinction since there is no Supreme Court case cited in *Rex* as authority for the distinction made in that case.

## II. ALTERNATIVELY, CERTIFY CASE TO THE SUPREME COURT OF FLORIDA

Since the case is a case of first impression on the issue raised regarding due process in an eminent domain case and the effect thereon by the "full compensation" requirement of the Florida Constitution, and since there is no written opinion by the Florida Second District Court of Appeals, there was neither Florida Constitutional nor procedural basis for Petitioner to appeal to the Supreme Court of Florida. The Supreme Court of Florida, however, may review a question of law certified to it by the Supreme Court of the United States

"which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida." Constitution of the State of Florida, Article V, Section 3(b)(6).

If this Honorable Supreme Court cannot justify granting certiorari for its review under the due process clause of the United States Constitution, Fifth and Fourteenth Amendments, then, as alternative relief, Petitioner requests that the case be certified to the Supreme Court of Florida for its review and opinion.

## CONCLUSION

The Court should grant the petition and directly address the application of the Due Process Clause to the facts of this case. Alternatively, this Court should certify the questions of law raised in the Petition, which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida, to the Supreme Court of Florida for its review and opinion.

Respectfully submitted,

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